412-644-5754

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| In the Matter of | DATE ISSUED: June 22, l994 |
| RICHARD SICKAU<br>Complainant | CASE NO 94-STA-26 |
| v. | |
| BULKMATIC TRANSPORT CO.<br>Respondent | |

Appearances:

Joseph W. Bennett, Jr. Esq.
For the Complainant

Adam Leos, Esq.
For the Respondent

Before: DANIEL L. LELAND
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

Richard Sickau (Complainant) filed a complaint with the Department of Labor on or about August 4, 1993, alleging that Respondent had discriminatorily discharged him in violation of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 2305, hereinafter referred to as the "STA". The Regional Administrator of the Occupational Safety and Health Administration issued his determination on February 2, 1994 for the Secretary of Labor. Said determination found that the evidence failed to support a merit finding and consequently Respondent's actions did not violate Section 2305 of the STA.

Complainant filed a written objection to the Regional Administrator's determination on March 4, 1994 and requested a hearing. A hearing on the merits was held in Buffalo, New York on April 5, 1994. Complainant's exhibit A and B and Respondent's exhibit A were submitted and admitted into evidence. Complainant's and Respondent's post hearing briefs were received on May 16, 1994 and May 9, 1994 respectively.[1]

[1] The following abbreviations have been used in this opinion: TR = hearing transcript, CX = Complainant's exhibit, and RX= Respondent's exhibit.

## BACKGROUND

Complainant was employed by the Respondent from October 6, 1989 until June 17, 1993. (TR 6). Complainant worked primarily as an interstate truck driver for Respondent. However, he did work as an operations manager for Respondent for a fourteen month period. On June 17, 1993 at approximately 9:00 a.m., Complainant called Respondent after unloading a shipment in Sayre, Pennsylvania in order to inquire as to his next dispatch. The dispatcher on duty, Mrs. Rene Eberhardt, informed Complainant that his next dispatch would be to Brooklyn, N.Y. Complainant maintains that he told Mrs. Eberhardt that he did not want to make the trip to Brooklyn but rather preferred a shorter one. In response, Complainant contends that Mrs. Eberhardt told him to take the load or be fired. Complainant told Mrs. Eberhardt that he would call her back later. According to Complainant, when he called her back, she insisted on his taking this load to Brooklyn. Complainant maintains that he explained to her that he had been working continuously for three weeks, that he was tired, and that he did not like traveling to New York City because it was an exhausting trip which did not allow for rest. (TR 9 -10). Complainant testified that he told Mrs. Eberhardt that he lacked sufficient hours to go to New York regardless of what his time logs reflected. According to Complainant, Mrs. Eberhardt responded that he was the only driver with enough hours to make this trip. (TR 17). When Complainant arrived at his house in Eden, N.Y. at approximately 3:00 or 3:30 p.m., the phone was ringing and Mrs. Eberhardt was on the line attempting to ascertain if Complainant was going to take the Brooklyn load. He told her that he would have to check with his wife and would call her back. After conferring with his wife, he told Mrs. Eberhardt that he could not make the trip. (TR 20). She responded that he should clean out his truck and return the trailer by five o'clock. Shortly thereafter, a mechanic and another driver under Respondent's employ arrived at Complainant's house to retrieve the trailer. (TR 21).

Respondent's version of the events differs significantly from Complainant's version. Respondent contends that Complainant did not state that he was tired or that he lacked sufficient hours. TR 58. Instead, Mrs. Eberhardt testified that Complainant told her that he had plenty of hours and was willing to make any run until she mentioned the load to Brooklyn. TR 52. Respondent maintains that the only reason that Complainant gave to her for refusing to take the load was his hatred of traveling to New York City. TR 52. Additionally, Respondent contends that Complainant failed to inquire both as to when the load was to be delivered to Brooklyn and as to when the trailer was to be returned to Buffalo. TR 53. However, Mrs. Eberhardt testified that she also failed to initiate these two topics with Complainant. TR 69.

## DISCUSSION

In order to prevail under the STA, an employee must establish that the employer discharged him because of the protected whistleblowing activity. Enacted in 1983 to promote safety of the highways, section 2305(b) of the Act provides as follows:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

To establish a prima facie case, the Complainant has the initial burden to show 1)that he or she engaged in protected activity under the STA 2)that he or she was the subject of adverse employment action and 3)that his or her Employer was aware of the protected activity when it took the adverse action. Complainant must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. Once Complainant has successfully established a prima facie case, the burden of production then shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its employment decision. Moon v. Transport Drivers, Inc., 836 F. 2d 226(6th Cir. 1987). If the Respondent is successful in rebutting the inference of retaliation, the Complainant must show either that his protected conduct more likely motivated the employer or that the employer's proffered explanation is not credible. Carroll v. J.B. Hunt, 91 STA 17.

Considering all of the evidence in the record, Complainant has met the three requirements for establishing his prima facie case. First, he engaged in protected activity; he refused to operate a vehicle "when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health." Section 2305(b) of the STA. Specifically, Complainant refused to take a load to Brooklyn, N.Y. because he was too fatigued. According to section 392.3 of the Federal Motor Carrier Safety Regulations : "no driver shall operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle." Complainant testified that he alerted Mrs. Eberhardt of his fatigue and of his inability to make this trip to Brooklyn. TR 9-10. In his own words, Complainant stated that "I

just felt I couldn't do the run. I was beat." TR 10. Although Rene Eberhardt's testimony conflicts with that of Complainant, I find Complainant's testimony more credible, as the evidence in the record supports Complainant's contention that he was fatigued. Complainant's testimony is corroborated by the testimony of his wife, Vicki Sickau, who was in close proximity to Complainant at the time of his final conversation with Mrs. Eberhardt. Mrs. Sickau testified that her husband told Mrs. Eberhardt that he was tired and was out of hours. TR 78. In fact, Mrs. Sickau testified that her husband had been complaining of being tired over the past two weeks, as he had been repeatedly driving two to three days straight without sleep. TR 79-80.

Complainant testified that he had already been on the road for eleven straight hours when the dispatcher gave him the dispatch to Brooklyn. Prior to his run to Sayre, Pennsylvania, he had delivered a load to Baltimore and then a load from Baltimore to Columbus. He testified that between the time of his Columbus load and the time he left for Sayre (4 a.m. on June 16, 1993) that he had only a few hours to clean up and change clothes without any time for rest. TR 13. I find that this evidence, as well as Mrs. Sickau's testimony, supports Complainant's contention that he felt too fatigued to take the load to Brooklyn.

As a result of Complainant's refusal to take the Brooklyn load, Respondent terminated Complainant's employment. Such termination establishes the second step of Complainant's prima facie case: that he was subject to adverse employment action. In addition, Respondent was aware of Complainant's protected activity, to refuse to drive due to fatigue, when Respondent fired Complainant. As previously discussed, Complainant repeatedly stated that he was too tired to take the Brooklyn run. However, Complainant must also establish that there was a causal link between his refusal to take the load due to his fatigue and Respondent's termination of his employment. In order to satisfy this link, Complainant must present evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. Mace v. Ona Delivery Systems, Inc., 91-STA-10. Neither party disputes that Respondent's firing of Complainant resulted from Complainant's refusal to take the Brooklyn load. Rather the disagreement surrounds the actual reason behind Complainant's refusal to take the load. Because I give more credence to Complainant's version of the events, specifically his articulation to Respondent of his fatigue and inability to make the run, I find that Complainant has satisfactorily established the required elements of his prima facie case.

However, the Respondent can rebut the inference arising from Complainant's prima facie case by setting forth legitimate non-discriminatory reasons for its adverse employment decision. Here, the Respondent sets forth two such reasons: 1) that Complainant had sufficient hours to take the Brooklyn load as

illustrated by his time logs and 2) that Complainant could have taken an eight hour break before leaving for Brooklyn. See Respondent's brief, p. 1-2. However, I find neither of these reasons to be credible or legitimate. As for Complainant's time logs, Respondent is correct that they showed 23 1/2 hours of remaining driving time. However, Complainant testified that he falsified these logs. TR 15. Complainant explained that the falsification of time logs was a well known and condoned practice within his employer's company. TR 17-18. According to Complainant's testimony, Respondent told its employees to "be creative" in order to insure that the loads be delivered on time.

A former employee of Respondent's company, Gary Webster, corroborated Complainant's testimony that the practice of falsifying logs was silently encouraged by Respondent. Mr. Webster testified that he had changed his logs many times during his employment with Respondent. TR 42. In addition, Mr. Webster testified that he, like Complainant, was told by Respondent to "be creative." TR 43. Because I find the falsification of time logs to be an acknowledged practice within Respondent's company,[2] I accordingly discount Respondent's explanation that it relied on Complainant's time logs as its basis for terminating Complainant. Consequently, I find Respondent's explanation to be without merit.

Similarly, I am not convinced of the legitimacy of Respondent's explanation that Complainant could have taken an eight hour break and still have made the trip to Brooklyn. In light of the fact that Respondent denied any knowledge of Complainant's fatigue, it seems inconsistent for Respondent now to base its rebuttal on an accommodation of Complainant's exhaustion. In fact, Mrs. Eberhardt admitted that she did not suggest or even discuss with Complainant the possibility of taking an eight hour break before delivering the load to Brooklyn. TR 65. She did not even tell Complainant when the load was due to arrive in Brooklyn or when the trailer was to be returned to Buffalo. TR 53. The evidence in the record fails to support Respondent's contention that it was willing to accommodate Complainant's fatigue.

Because I find neither of Respondent's proffered explanations to be reasonable or credible, I hold that Respondent has not successfully rebutted Complainant's prima facie case. Accordingly, I find that Respondent illegally discharged

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[2] Mrs. Eberhardt testified that Respondent has had recent compliance problems with the Department of Transportation. TR 57. In fact, a letter dated September 16, 1993, from Arnold T. Johnsen, State Director, Office of Motor Carriers, states that instances of noncompliance were discovered and an enforcement action against Respondent is pending. CX B.

Complainant on June 17, 1993 in violation of Section 2305(b) of the STA.

Under 49 U.S.C. §2305(c)(2)(B), Complainant is entitled to reinstatement, compensation, including back pay, and compensatory damages. In addition, Complainant is entitled to all costs and expenses as well as the payment of all reasonably incurred attorney's fees.

Complainant does not seek reinstatement but does seek payment of his lost earnings in the amount of $12,708.43 and payment of all reasonably incurred legal fees. Complainant has attempted to mitigate his damages by working intermittently since his termination by Respondent. Accordingly, Complainant has deducted the amount that he has earned from the total lost earnings sought. See Complainant's post hearing brief, p. 6-7.

I find Complainant entitled to lost earnings in the amount of $12, 708.43 and to all reasonably incurred legal fees.

## RECOMMENDED ORDER

As Complainant has established a violation against him by Employer under the STA, it is therefore ORDERED that:

1. Employer shall pay Complainant compensation in the form of lost earnings in the amount of $12,708.43.

2. Employer shall pay all of Complainant's attorney fees that were reasonably incurred in the preparation and litigation of this case.

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DANIEL L. LELAND
Administrative Law Judge

DLL/rh/bjh